No. 15,170

United States Court of Appeals

For the Ninth Circuit

GRACE LOWE,

Appellant,

vs.

GLENN A. WILLACY,

Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

This is an appeal from an order of the District Court for the District of Alaska, Fourth Division, dismissing appellant's Amended Complaint in an action brought by appellant to recover damages from appellee as surety on the statutory bond of Nedra Boring, United States Commissioner, Fairbanks Precinct, Fourth Division, Territory of Alaska; and from order of said District Court refusing to review its order of dismissal and dismissing appellant's "Motion To Reargue" after an appeal had been taken by appellant from said order of dismissal.

Appellant relies on Title 28, USCA, Section 1291, for the jurisdiction of this Court to review the rulings set out above.

STATEMENT OF THE CASE.

The appellee, Glenn Willacy, defendant below, was a surety on the statutory bond of Nedra Boring, United States Commissioner and ex-officio Probate Judge for the Fairbanks Precinct, Fourth Division, Territory of Alaska (T.R. 2). The condition of the bond was that the said Nedra Boring "shall faithfully perform the duties of United States Commissioner" and said bond was furnished pursuant to the Act of Congress of June 6, 1900, c. 786, sec. 12 (48 FCA 105) "in the penalty of $1,000.00. . ."

Among the duties thus bonded are those of probate judge and justice of the peace, statutory incidents of the office of a Commissioner in Alaska. (Act of Congress of June 6, 1900, c. 786, sec. 6 (48 FCA 108).

In exercising the function of a probate judge, Commissioner Boring allegedly ordered the appellant Lowe to appear in the Probate Court in connection with an estate proceeding (Amended Complaint, paragraphs I and II, T.R. 4). The nature of the proceeding and of the Commissioner's order and citation to appellee Lowe does not appear on the face of the Amended Complaint or anywhere else in the Transcript of Record. It may be garnered from Miss Lowe's brief (pages not numbered on copy of brief served on appellee) that a decedent's estate was in-

volved and that appellant was cited to appear pursuant to the provisions of ACLA 1949, section 61-6-2.

That section is quoted in full as follows:

> "*Property concealed or wrongfully disposed of: Citation.* Whenever it appears probable from the affidavit of an executor or administrator, or of an heir or other person interested in the estate, that any person has concealed or in any way secreted or disposed of any property of the estate, or any writing relating or pertaining thereto, or that such person has knowledge of any such property or writing being so concealed, secreted, or disposed of, and refuses to disclose the same to the executor or administrator, the commissioner, upon the application of such executor or administrator, may cite such person to appear and answer under oath concerning the matter charged (CLA 1913, Sec. 1642; CLA 1933, Sec. 4401.)"

Appellant Lowe sought to recover damages against the appellee Willacy as surety on Commissioner Boring's bond based upon an allegation that the citation was void because the administrator of the decedent's estate had not filed an administrator's bond as required by ACLA 1949, section 61-4-1 (Amended Complaint, paragraph II, T.R. 4).

That section of the Alaska Code reads in full as follows:

> "When required: Exception: Executor's liability. No executor or administrator is authorized to act as such until he shall file with the commissioner having jurisdiction of the estate an undertaking in a sum not less than equal the prob-

> able value of the estate, with one or more sufficient sureties, to be approved by the commissioner, to be void upon condition that such executor or administrator shall faithfully perform the duties of his trust according to law; provided, when by the terms of his will a testator shall expressly declare that no bonds shall be required of his executor, such executor may act upon taking an oath to faithfully fulfill the trust without filing the undertaking in this section mentioned; provided further, such executor shall be criminally and civilly liable as other executors and administrators are for any dereliction of duty. (CLA 1913, Sec. 1609; CLA 1933, Sec. 4365; am L 1943, ch 4, Sec. 1, p. 45.)''

Issue was joined upon appellee's answer denying the allegations of the Amended Complaint and affirmatively alleging its failure to state a claim (T.R. 6).

At pre-trial conference, the Court below dismissed the complaint. The copy of the typewritten transcript of record served upon appellee contains neither the date of the order nor its content (T.R. 6). However, it is appellee's recollection that the Court below held that the Commissioner Boring had not acted without jurisdiction and therefore was not liable to appellant. Appellee's liability as surety could, of course, be no greater.

On April 23, 1956, appellant filed Notice of Appeal in the Court below from the Order of Dismissal at pre-trial (T.R. 19). On the same day appellant filed a motion denominated ''Motion to Re Argue (sic) and

Brief in Support'' in which she requested the Court below to ''rehear and consider Amended Complaint submitted with supporting brief'' (T.R. 7).

This motion was dismissed for lack of jurisdiction by the Court below. The date or content of the Order to Dismiss does not appear in the typewritten copy of the transcript of record served upon appellee (T.R. 17).

A second Notice of Appeal was filed in the Court below on the 7th of May, 1956, from both the order dismissing the complaint and from the order dismissing appellant's Motion to Reargue (T.R. 17).

Appellant specifies as error the two rulings of the Court below set out above (Statement of Points, T.R. 18 and Appellant's Statement of Case appearing on the third page of her brief).

ARGUMENT OF CASE.

I. SPECIFICATION THAT COURT ERRED IN DISMISSING APPELLANT'S ''MOTION TO REARGUE''.

We will consider first appellant's specification that the Court below erred in dismissing appellant's ''Motion to Re Argue (sic) and Brief in Support'' for lack of jurisdiction.

As previously indicated this motion was filed after appellant had already filed a Notice of Appeal from the prior order of that Court dismissing her complaint.

The perfection of an appeal, of course, divested the Court below of any further jurisdiction in the cause except that specifically saved to it under Rules 60(a) and 73 of the Federal Rules of Civil Procedure. (*Jordon v. Federal Farm Mortgage Corp.,* CCA Iowa 1945, 152 F. (2d) 642, certiorari denied 66 S. Ct. 1339, 328 U.S. 821, 90 L. Ed. 1601, certiorari dismissed 66 S. Ct. 1340, 328 U.S. 852, 90 L. Ed. 1624. *Daniels v. Goldberg,* USDC New York 8 F.R.D. 580, affirmed 173 F. (2d) 911. Thus under Rule 60(a) clerical mistakes or omissions in the record may be corrected during the pendency of an appeal before the appeal is actually docketed in the Appellate Court, and under Rule 73 the time for docketing an appeal may be extended by the lower Court and the appeal may also be dismissed prior to its being docketed upon stipulation of the parties or upon motion and notice. Appellant in the instant case did not elect to dismiss her appeal, and no provision is made in the Rules for a court to review an order which it makes from which an appeal has been taken.

Under the clear intent of Rule 73, an appeal is deemed perfected upon filing of the required notice. *Daniels v. Goldberg,* supra.

II. SPECIFICATION THAT COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT.

Appellant also specifies as error the order of the Court below dismissing her amended complaint. Assuming even that appellant could prove every material

allegation of her complaint as supplemented by her brief on file in this Court, there was no error.

It is to be noted that ACLA 1949, section 61-4-1 (set out in full, pp. 3-4, supra) does not make the filing of an Administrator's Bond a condition precedent to the appointment of an administrator, but merely provides that he will not "act as such" until he has filed the required bond. The normal duties of an administrator are to garner, protect and conserve the assets of an estate; to pay the expenses of administration and the lawful creditors of a decedent out of the assets thereof converting so much thereof as is necessary to cash; and finally to make distribution of the residue of the estate in proper ratio to the heirs at law of the decedent. In the instant case preparatory to actually assuming those duties, the administrator caused the Commissioner as Probate Judge to issue a citation to the appellee so that he and the Probate Court could be advised of the value, location and nature of the assets of the decedent which the appellee might have possession of or know about. He was certainly not acting as an administrator in the ordinary sense of the word nor was he actually taking any property into his possession making a bond necessary for the protection of the decedent's heirs and creditors. ACLA 1949, sec. 61-6-2 cited in full, supra, p. 3, does not specify that the citation be issued upon request of an executor or administrator who has filed a bond. Furthermore, it is difficult to conceive why any ordinary person would find it necessary to engage the services of an attorney to prevent inquiry made of her as to the assets of a decedent.

Aside, however, from the question of statutory construction, it is clear that the Commissioner as Probate Judge had jurisdiction of the subject matter of the proceeding—an inquiry into the location of the assets of a decedent. Having such jurisdiction, neither she nor her surety could be liable for the issuance of a citation void by reason of some procedural omission or defect.

We believe that the appellant fails to understand the difference between an act in clear absence of jurisdiction for which liability would attach and an act in excess of jurisdiction for which there would be no liability. Had appellant read the opinion in the landmark case of *Bradley v. Fischer,* 13 U.S. (Wallace) 335 cited in her brief as authoritative, she would not have commenced this suit in the first instance.

Particularly she should have heeded the following language commencing at page 351 of that opinion:

> "In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exer-

cise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon

to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the Court of King's Bench, in *Ackerley v. Parkinson.** In that case an action was brought against the vicar-general of the Bishop of Chester and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was, whether under these circumstances the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was nullity, and said, that 'no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine.*' Mr.

*3 Maule & Selwyn, 411.

Justice Blanc said there was a 'material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;' and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public

prosecution in the form of impeachment, or in such other form as may be specially prescribed."

Although the Supreme Court's opinion refers specifically to courts of general jurisdiction, the rule as stated is generally held to be and should be equally applicable to courts of inferior jurisdiction. 30 Am. Jur. (Judges), Sections 43 and 44, pages 756, 757.

CONCLUSION.

It is appellee's conclusion on the basis of statutory construction and applicable precedents that appellee could not be liable to appellant under any conceivable set of circumstances provable under the allegations of her Amended Complaint.

It is appellee's further conclusion that the Court below was completely devoid of any jurisdiction to entertain appellant's "Motion to Reargue" on its merits in view of appellant's election to appeal from the Court's Order of Dismissal.

For appellant's benefit, it may be noted that this cause is incorrectly captioned in this Court. It is appellant's recollection that appellant was permitted to amend the title of the cause in the Court below by proper designation of the plaintiff as the "United States of America ex rel. Grace Lowe."

Appellee prays that the Court confirm the order of the Court below and that appellee be allowed costs

incurred for the printing of this brief and such other costs as may be incurred herein.

Dated, Fairbanks, Alaska,
September 21, 1956.

Respectfully submitted,
WILLIAM V. BOGGESS,
Attorney for Appellee.